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PP

v.

STEVEN LANI

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COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
CLEMENT SKINNER JCA
AZIAH ALI JCA
[CRIMINAL APPEAL NO: Q-05-252-2010]

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17 JANUARY 2013

CRIMINAL LAW: *Penal Code - Section 302 - Charge for murder - Failure by prosecution to establish prima facie case - Whether appropriate to amend charge to offence under s. 304(a) Penal Code*

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A drinking session involving a very strong alcoholic beverage between the deceased, PW8, PW9 and one Mambong Oyok went awry when the respondent suddenly broke a bottle with his right hand and jabbed the broken bottle onto the left cheek of the

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deceased. When the deceased ran away, the respondent chased him and stabbed the deceased on his left hand and left armpit. PW3, the consultant pathologist who prepared the post mortem report confirmed that the cause of death was 'hypovolaemic shock' due to excessive bleeding of the wound at the left armpit.

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According to PW3, under the armpit runs the major blood vessels and only medically trained persons would likely know the fact. The respondent was originally charged with an offence of murder under s. 302 of the Penal Code ('the Code'). At the end of the prosecution's case, the trial judge ruled that the prosecution had

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failed to establish a *prima facie* case under s. 302 of the Code and had instead proven a *prima facie* case under s. 304(a) and amended the charge accordingly. The respondent elected to remain silent when called to enter his defence. The respondent was convicted on the amended charge and sentenced to 11 years

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imprisonment. This was the appeal by the prosecution, being dissatisfied with the decision of the learned judge in amending the charge from s. 302 to s. 304(a) of the Code.

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Held (dismissing appeal; affirming conviction and sentence imposed by High Court)
Per Aziah Ali JCA delivering the judgment of the court:

(1) It could not be disputed that it was the respondent who had inflicted the injuries on the deceased. However, the burden was on the prosecution to discharge based on the evidence adduced. (para 14)

(2) It was not disputed that there was no history of hostility between the respondent and the deceased. They were related to each other and were good friends. There was also no evidence of provocation or altercation between them at the material time. The injuries were inflicted in a quick succession and were over in seconds thus ruling out the element of premeditation. The evidence did not suggest that the respondent intentionally aimed the fatal jab at the armpit of the deceased. The jab landed at the deceased's armpit because unfortunately he had raised his left arm probably to fend off the respondent. (para 17)

(3) The evidence of PW8 and PW9 that the three jabs were delivered in a quick succession did not support the prosecution's contention that the respondent's act of chasing the deceased showed an intention to kill. (para 17)

(4) On a totality of the evidence, the prosecution had failed to establish a *prima facie* case under s. 300 against the respondent. The acts of the respondent were that of an intention to cause such bodily injury that was likely to cause death. Hence, his act fell squarely within s. 299 and fell short of s. 300 of the Code. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Suatu sesi minum bersama-sama melibatkan minuman keras alkohol antara si mati, PW8, PW9 dan Mambang Oyok berubah menjadi buruk apabila responden secara tiba-tiba memecahkan satu botol dengan tangan kanannya dan menikam pipi kiri si mati dengan botol yang pecah tersebut. Apabila si mati melarikan diri, responden mengejarnya dan menikam pipi kiri si mati dengan si mati pada tangan kiri dan bahagian kiri ketiaknya. PW3, pakar perunding patologi yang menyediakan laporan bedah siasat mengesahkan bahawa sebab kematian adalah 'hypovolaemic shock' disebabkan oleh pendarahan berlebihan pada luka di bahagian ketiak kiri. Menurut PW3, di bawah ketiak terdapat saluran darah

besar dan hanya seseorang yang dilatih dari segi perubatan yang akan mengetahui fakta tersebut. Responden pada asalnya dituduh dengan kesalahan membunuh di bawah s. 302 Kanun Keseksaan ('Kanun'). Di akhir kes pihak pendakwaan, hakim bicara memerintahkan bahawa pihak pendakwaan telah gagal membuktikan kes *prima facie* di bawah s. 302 Kanun dan sebaliknya telah membuktikan kes *prima facie* di bawah s. 304(a) dan membuat pindaan sewajarnya kepada pertuduhan. Responden memilih untuk berdiam diri apabila dipanggil membela diri. Responden disabitkan atas pertuduhan yang dipinda dan dijatuhkan hukuman 11 tahun penjara. Ini adalah rayuan oleh pihak pendakwaan, yang tidak berpuas hati dengan keputusan yang arif hakim dalam meminda pertuduhan daripada s. 302 kepada s. 304(a).

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman yang dikenakan oleh Mahkamah Tinggi)
Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:

(1) Tidak boleh dipertikaikan bahawa responden adalah orang yang telah menyebabkan kecederaan kepada si mati. Walau bagaimanapun, beban terletak pada pihak pendakwaan untuk melepaskannya berdasarkan kepada keterangan yang dikemukakan.

(2) Tidak dipertikaikan bahawa tidak ada sejarah permusuhan antara responden dan si mati. Mereka adalah bersaudara dan berkawan baik. Juga tidak ada keterangan tentang provokasi atau perbalahan antara mereka pada masa material. Kecederaan-kecederaan tersebut berlaku secara tiba-tiba dan berakhir dalam beberapa saat dengan itu menidakkan elemen perancangan terdahulu. Keterangan juga tidak menyarankan bahawa responden telah dengan sengaja menikam pada bahagian ketiak si mati. Tikaman tersebut terkena pada bahagian ketiak si mati kerana malangnya dia telah mengangkat tangan kirinya, berkemungkinan untuk mengelak responden.

(3) Keterangan PW8 dan PW9 bahawa ketiga-tiga tikaman dikenakan secara tiba-tiba tidak menyokong hujahan pihak pendakwaan bahawa tindakan responden mengejar si mati menunjukkan niat untuk membunuh.

(4) Atas keseluruhan keterangan, pihak pendakwaan gagal membuktikan kes *prima facie* di bawah s. 300 terhadap responden. Tindakan-tindakan responden menunjukkan niat untuk mengakibatkan kecederaan kepada tubuh badan yang

kemungkinan membawa kepada kematian. Maka, tindakannya terangkum di bawah s. 299 dan tidak memenuhi s. 300 Kanun.

Case(s) referred to:
PP v. Megat Shahrizat Megat Shahrur [2011] 8 CLJ 893 FC ***(foll)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(refd)***

Legislation referred to:
Penal Code, ss. 299, 300(c), 302, 304(a)

For the appellant - Awang Armadajaya Awang Mahmud (PG Cyril PG Chandradasa with him); DPP
For the respondent - Ranbir Singh Sangha; M/s Ranbir Singh Sangha & Co

[Appeal from High Court, Miri; Criminal Trial No: 45-01-2008]

Reported by S Barathi

JUDGMENT

Aziah Ali JCA:

[1] The respondent was charged with the offence of murder under s. 302 of the Penal Code. At the end of the prosecution case the learned High Court Judge ruled that the prosecution had failed to establish a *prima facie* case under s. 302 but had successfully established a *prima facie* case under s. 304(a) of the same Code. The learned trial judge thereupon amended the charge against the respondent as follows:

> That you on 16.12.2006 at about 6.15 p.m. at a rest hut at Long Lenei Tutoh, in the District of Baram, in the state of Sarawak committed culpable homicide not amounting to murder by causing the death of one Willie Labat with the intention of causing such bodily injury as is likely to cause death and that you have thereby committed an offence punishable under section 304(a) of the Penal Code.

[2] The amended charge was read and explained to the respondent. Upon being called to enter his defence the respondent elected to remain silent. The learned trial judge duly convicted the respondent on the amended charge and sentenced him to 11 years imprisonment effective from the date of his arrest. The Public Prosecutor is dissatisfied with the decision of the learned judge to amend the charge from s. 302 to s. 304(a) of the Code. We heard the submissions and scrutinised the appeal record and we agreed

A with the learned trial judge. The appeal was therefore dismissed and the conviction and sentence imposed by the learned trial judge was affirmed. We now give our reasons as set out below.

[3] According to the evidence adduced by the prosecution
B through PW8 Senin bin Muda, on 16 December 2006 at about 2pm there was a drinking session at a hut beside a river in the deceased's village. Present were PW8, the respondent, the deceased, PW9 John Palau and one Mambang Oyok. Mambang is the father-in-law of PW8. The respondent is the second cousin to
C PW8. The deceased was PW8's nephew. They all lived in the same longhouse. They were consuming what PW8 described as a "very very strong" alcoholic drink with the brand name "Penghulu" contained in reddish coloured glass bottles. The alcoholic drink was drunk either mixed with young coconut water
D or by drinking the alcoholic drink followed by the coconut water. A parang and a knife were used to cut open the coconut. According to PW8 they shared five bottles of the drink, were having casual conversation, making jokes and eating barbecued fish.

E **[4]** PW8 said that the respondent suddenly broke a bottle of the alcoholic drink and holding the neck of the broken bottle with his right hand jabbed the broken bottle onto the deceased's left cheek. When the deceased ran away the respondent chased him
F and stabbed the deceased on his left hand and his left armpit. The deceased was bleeding heavily and he ran back to the longhouse followed by the respondent. However in cross-examination PW8 said that the second and third attack was continuous and immediate. The stabbings were inflicted in quick
G succession. He agreed that what happened was a sudden event and was over in seconds. PW8 demonstrated to the court to show that the respondent jabbed from the upper front of the deceased's chest at the armpit. He said the deceased did not shout or scream. PW8 agreed with the defence counsel that there had
H never been any problem between the respondent and the deceased. In fact they were good friends. According to him prior to the incident there was no quarrel between the respondent and the deceased nor was there any provocation by the deceased. PW8 admitted that at the time of the incident he was drunk.

I **[5]** PW9 is the respondent's third cousin. The deceased was his nephew. PW9 said he was not drunk at the time. He confirmed that the respondent jabbed the deceased's left cheek with the broken bottle followed by the jabs on the right arm and left

armpit. The three jabs all happened within seconds. PW9 said he did not do anything because he was scared and panicked as the incident happened too fast.

[6] The deceased's father PW10 was at that time having a bath at the river opposite the longhouse when he was called by his wife who informed him that the deceased was at their longhouse and injured. When PW10 saw the deceased he was lying on the floor with his face down. He was told by the deceased that 'Steven' had injured him. PW10 managed to get a boat from a nearby timber camp to send the deceased to Marudi Hospital. With his wife's help PW10 carried the deceased to the boat but half way to the boat the deceased died. So PW10 brought the deceased back to the longhouse. At 10pm that night PW10 called the police.

[7] PW3 a consultant pathologist prepared the post mortem report (exh. P26). The deceased suffered six injuries. The fatal injury was a large laceration at his left armpit which cut the major blood vessels of the left upper limb causing excessive bleeding. The cause of death was 'hypovolaemic shock' due to excessive bleeding of the wound at the left armpit. According to PW3 under the armpit runs major blood vessels and only medically-trained persons would likely know this fact. The injury was fatal in nature but there was a chance of survival if he was brought to the hospital within an hour. Apart from this injury, there were other injuries which the pathologist PW3 said could be due to a fall onto a sharp object (injury no. 2), or due to a struggle (injuries no. 3, 4, 5 and 6) or defensive injury (injury no. 3). PW3 testified that for the fatal injury to be inflicted the deceased would have lifted his left arm exposing his left armpit thus giving his opponent an opportunity to jab at the armpit with a sharp object. He testified that the likely weapon causing such injury was a sharp object such as broken metal or glass or bottle.

[8] Learned Deputy Public Prosecutor (DPP) submitted before us that the trial judge had erred in reducing the charge as the respondent's act fell squarely under limb (c) of s. 300. It was submitted that the respondent chased after the deceased when the deceased had run away. This, the prosecution contended, showed that the respondent intended to cause the injuries on the deceased. The injury to the armpit was inflicted when the deceased raised his left arm to defend himself. Learned DPP referred to the testimony of PW3 the pathologist who said that the nature of the wound showed that it was inflicted with strong

force. It was submitted that the respondent inflicted the injuries on the deceased with the intention of causing bodily injury to the deceased and such bodily injury was sufficient in the ordinary course of nature to cause death. For the respondent learned counsel submitted that there was no intention or motivation or premeditation by the respondent. The parang and knife used to cut the coconuts were within reach yet the respondent did not use them. Counsel submitted that the evidence of PW8 and PW9 that the deceased did not raise his left arm was not credible because PW3 had said that the injury to the armpit was inflicted from the front when the deceased lifted his left arm.

[9] Learned DPP had relied on s. 300(c) which states as follows:

> 300. Murder.
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> Except in the cases hereinafter excepted, culpable homicide is murder:
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> (a) ...
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> (b) ...
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> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death,
>
> or
>
> (d) ...

[10] Culpable homicide is defined under s. 299 of the Code as follows:

> 299. Culpable homicide.
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> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

[11] The Federal Court through the judgment of Richard Malanjum CJSS in *PP v. Megat Shahrizat Megat Shahrur* [2011] 8 CLJ 893 had the occasion to discuss and illustrate the difference between ss. 299 and s. 300 of the Code and the correct application of the two sections. In that case the respondent was originally charged for murder under s. 302 of the Code. The prosecution sought to rely on circumstantial evidence

to establish a case under s. 300. The learned trial judge had ruled that there was a *prima facie* case under s. 304(a) of the Code since it fell squarely within s. 299 of the said Code and fell short of s. 300. The prosecution contended in the Court of Appeal and the Federal Court that the learned trial judge had erred in arriving at such a conclusion. The prosecution contended that the injuries inflicted upon the deceased were done with the intention of causing bodily injuries which was sufficient in the ordinary course of nature to cause death, and thus fell within the ambit of s. 300. The Court of Appeal took the view that the acts of the respondent were that of an intention to cause such bodily injury that was likely to cause death and upheld the decision of the trial court to reduce the charge to one of culpable homicide. Thus the basic issue before the Federal Court was on the difference between s. 299 and s. 300 of the Code. In delivering the judgment of the court Richard Malanjum CJSS referred to the judgment of Raja Azlan Shah FJ (as His Highness then was) in the case of *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174 wherein His Highness dealt with the issue of the close connection that the Penal Code makes between intention and knowledge. His Highness said as follows:

> The provisions relating to murder and culpable homicide are probably the most tricky in the Code and are so technical as frequently to lead to confusion. Not only does the Code draw a distinction between intention and knowledge but subtle distinctions are drawn between the degrees of intention to inflict bodily injury.

[12] His Highness went on to discuss the distinctions between the provisions of s. 299 and s. 300 of the Code. We take the liberty of reproducing that part of the judgment as follows:

> Section 299, Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that ... the act is likely to cause death. Section 300, Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and ... is sufficient in the ordinary course of nature to cause death; (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.

A The words which I have italized show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1) the offence is always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. Illustration (d) of s. 300, Penal Code is a case of this description. Where the offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of s. 300, Penal Code is a good example. The essence of (b) and (3) is this. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. Illustration (c) given in s. 300, Penal Code is an example. It is on a comparison of these two limbs of s. 299 and s. 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability.

A comparison that frequently arises in the application of ss. 299 and 300 is the tenuous contention that s. 299 is not a substantive offence and therefore an offence is either murder or culpable homicide according to whether or not one of the exceptions to s. 300 apply, and if by reason of the absence of the necessary degree of *mens rea* an offence does not fall within s. 300, it cannot be one of culpable homicide not amounting to murder punishable under s. 304, Penal Code, but would amount to causing grievous hurt. In our view, the correct approach to the application of the two sections is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s. 300, Penal Code apply, and (b) where the necessary degree of *mens rea* specified in s. 299 is present, but not the special degrees of *mens rea* referred to in s. 300, Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within s. 300, Penal Code must necessarily fall within s. 299, but all cases falling within s. 299 do not necessarily fall within s. 300. The first part of s. 304, Penal Code covers cases which by reason of the exceptions are taken out of the purview of s. 300, cll 1, 2, 3 but otherwise would fall within it and also cases which fall within the second part of s. 299, but not within s. 300, cll 2, 3. The second part of s. 304, Penal Code covers cases falling within the third part of s. 299 not falling within s. 300, cl 4.

[13] Reverting to the case of *Megat Shahrizat Megat Shahrur* (*supra*) Richard Malanjun CJSS in his judgment said: A

> Thus, if death is an imminent result, it falls under s. 300. If on the other hand, that death is a likely result, it falls under s. 299. It would be safe to conclude that all cases under s.300 would fall under s. 299 as well, but this is not necessarily so *vice versa*. B

[14] In the present appeal it cannot be disputed that it was the respondent who had inflicted the injuries on the deceased. In acting as he did, the issue before us was whether at the time the respondent inflicted the fatal injury on the deceased he had C the special degree of *mens rea* referred to in s. 300 of the Code. The burden is on the prosecution to discharge based on the evidence adduced.

[15] The learned trial judge found that the respondent had no D intention to kill the deceased but had committed culpable homicide as defined under s. 299 of the Code. In arriving at his finding the learned judge considered the following:

(a) there was no premeditation and the act happened on the spur E of the moment;

(b) the nature of the injuries;

(c) the nature of the weapon used;

(d) the respondent did not use the parang or the knife which F were used to cut open the coconut fruits;

(e) there was no previous misunderstanding or ill feelings between the respondent and the deceased;

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(f) the respondent could not have known that there were major blood vessels running through the armpit;

(g) the respondent's urine sample was negative for alcohol.

[16] The learned trial judge concluded that the above factors did H not and could not constitute intention to cause death or intention to cause bodily injury knowing it likely to cause death or intention to cause bodily injury sufficient in the ordinary cause of nature to cause death or that the respondent knew that his act was so imminently dangerous that it will cause death. I

[17] We have perused the record of appeal and considered the submissions made. It was not disputed that there was no history of hostility between the respondent and the deceased. In fact they were related to each other and were good friends. There was no evidence of provocation or altercation between them at the material time. Two weapons ie, a parang and a knife were within reach of the respondent yet he did not use them. PW3 said the fatal injury would have been inflicted when the deceased had raised his left arm. It was not disputed that a layman with no medical knowledge would not know that underneath the armpit are major blood vessels and stabbing or slashing that part of the body would likely cause major blood vessels to be severed. As PW8 and PW9 had testified the incident was a sudden event. The injuries were inflicted in quick succession and was over in seconds thus ruling out the element of premeditation. The evidence did not suggest that the respondent intentionally aimed the third fatal jab at the deceased's armpit. The third jab landed at the deceased's armpit because unfortunately he had raised his left arm probably to fend off the respondent. The prosecution had submitted that the respondent's act of chasing the deceased showed an intention to kill. We find the evidence of PW8 and PW9 that the three jabs were delivered in quick succession did not support this contention. On a totality of the evidence we agreed with the trial judge that the prosecution had failed to establish a *prima facie* case under s. 300 against the respondent. In our considered view the acts of the respondent were that of an intention to cause such bodily injury that was likely to cause death. Hence the respondent's act fell squarely within s. 299 of the Code and fell short of s. 300. For the reasons stated above we dismissed the appeal and affirmed the conviction and sentence imposed by the High Court.